Supreme Court, U.S.
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NO. 03-503

IN THE SUPREME COURT OF THE UNITED STATES
October Term. 2003

ATTORNEY E,

Petitioner,

vs.

THIRD PARTY MOVANTS FOR PROTECTIVE ORDER,

Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 20, 2003

QUESTION PRESENTED

1. Is the First Amendment violated by a Protective Order that prohibits dissemination of information in confidential FBI files, where the FBI files were obtained by the Colorado Office of Attorney Regulation Counsel pursuant to its subpoena power to investigate alleged misconduct by an attorney, and the FBI files were produced to the attorney being investigated in discovery in the disciplinary proceeding?

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Respondents are two Colorado state court judges who moved for a protective order as third party movants in the litigation below. The judges respectfully submit the following as their Brief in Opposition to the Petition for Writ of Certiorari:

OPINIONS BELOW

Petitioner seeks review of a decision of the Colorado Supreme Court that was published in the advance sheets for the Pacific Reporter (Third Series) at 73 P.3d 648. By Order of the Colorado Supreme Court dated September 4, 2003, that decision was withdrawn. App. B, *infra*; see also *In the Matter of the Requests for Investigation of Attorney E*, 73 P.3d 648 (withdrawn for National Reporter Service bound volume), 2003 WL 21373173 (Colo. 2003). The Colorado Supreme Court then circulated a proposed draft of a final decision and solicited the comments of the parties on such draft. The Colorado Supreme Court issued its final opinion on October 14, 2003, which is reported at 78 P.3d 300, 2003 WL 22339463. The Colorado Supreme Court's final opinion is reproduced in Appendix A, *infra*.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a). The Petition for Writ of Certiorari, filed on September 30, 2003, actually preceded the Colorado Supreme Court's final decision in the case. On September 4, 2003, the Colorado Supreme Court withdrew its opinion of June 16, 2003, (modified July 2, 2003), and announced its intention to issue a new modified opinion. The Colorado Supreme Court issued its final opinion on October 14, 2003.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

U.S. Const. Amend. I:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Colo.R.Civ.P. 251.10 is reprinted in Appendix C, pp. 4c-6c.

Colo.R.Civ.P. 251.31 is reprinted in Appendix C, pp. 6c-12c.

Colo.R.Civ.P. 45 is reprinted in Appendix C, pp. 1c-4c.

STATEMENT OF THE CASE [1]

The unusual and convoluted circumstances of this case involve whether Attorney E, the Petitioner, can continue to publish confidential FBI investigative files containing defamatory and scandalous rumors about the Respondents, two Colorado judges (hereinafter referred to as "the Judges"). Attorney E obtained the files in discovery during the confidential investigative phase of his own attorney discipline case, in which he was accused of engaging in unethical conduct while practicing law. Once he received the FBI files containing the meritless, yet shocking, allegations of illegal activity, Attorney E disseminated their contents, including by filing them in cases in which he appeared as an attorney and over which the Judges presided.

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[1] This case was before the Court previously on a Petition for Writ of Certiorari in Case No. 01-1365. Certiorari was denied on June 17, 2002.

The Judges, as third parties to Attorney E's disciplinary proceeding, successfully petitioned the Presiding Disciplinary Judge for a protective order against Attorney E's conduct under Colo.R.Civ.P. 251.31(e), (App. C *infra*, pp. 8c-9c), on grounds that the FBI files were confidential and entitled to protection under both state and federal law. The Protective Order prevents Attorney E and the Colorado Attorney Regulation Counsel from further publishing or distributing documents from the FBI files and the information they contain. Attorney E challenges this Protective Order as offensive to the First Amendment to the United States Constitution.

Attorney E is licensed to practice law in Colorado. He has appeared before the Judges in various matters. One of the judges formerly presided in a particular matter in which the judge ultimately granted summary judgment for the defendants in the case and imposed sanctions against Attorney E under Colo.R.Civ.P. 11. Upon information and belief, the matter remains pending on an appeal or appeals and/or post-judgment motions.

In addition, the other of the Judges presided over a jury trial on misdemeanor assault charges against an individual. The trial led to a guilty verdict and a jail sentence. Attorney E did not participate in the trial, and the case had been closed for nearly a decade when Attorney E entered his appearance and filed several motions for post-conviction review. Attorney E contended that the Judge was biased against his client, sought the Judge's recusal, and subsequently commenced an action against the Judge for a writ in the nature of mandamus and for damages.

In 1997, the FBI investigated allegations that one of the Judges had engaged in illegal activity. The FBI, however, neither interviewed the Judge who was the subject of the investigation nor informed him of the investigation.

The FBI's inquiry consisted largely of interviews with individuals who were asked to comment on the Judge's behavior and judicial demeanor. Many of the persons interviewed made disparaging accusations or repeated scandalous rumors against both Judges as well as nearly 100 other individuals. Written summaries of the interviews were placed in an investigative file maintained by the FBI.

At the conclusion of its investigation, the FBI submitted the matter to the United States Attorney for the District of Colorado. The FBI reported no evidence of illegal activity by the Judges and no instances of official misconduct. The FBI also reported that certain allegations of misconduct were "unsubstantiated." On December 8, 1997, the United States Attorney declined the case. The FBI then terminated its investigation. No charges were ever filed against either of the Judges.

In connection with cases in which he appeared before the judges, and in his efforts to overturn judgments and orders against his clients and himself in those cases, Attorney E made disparaging statements against the Judges, and others, similar to the rumors that were investigated by the FBI in 1997. Two separate complaints concerning Attorney E were made to Colorado's Office of Attorney Regulation Counsel ("ARC").[2] Based on the complaints, the ARC opened an investigation under Colo.R.Civ.P. 251.10 into Attorney E's conduct and whether it violated provisions of the Colorado Rules of Professional Conduct.

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[2] Neither of the complaints involved in the ARC's current investigation was made by the Judges. One complaint (No. 01-01375) was filed by Bernie Fay, a probation officer in Huerfano County also defamed by Attorney E's statements. The other investigation (No. 01-00964) was commenced by the Office of Attorney Regulation itself.

As part of its investigation into alleged ethical violations of Attorney E, the ARC served a subpoena duces tecum to the FBI for production of documents related to its investigation of the Judges. The subpoena was issued pursuant to Colo.R.Civ.P. 251.10(b)(2), (App. C *infra*, pp. 4c-6c), which incorporates Colo.R.Civ.P. 45, (App. C *infra*, p. 5c). On October 5, 2001, the FBI turned over its file to the ARC.

The FBI file consists of approximately 60 pages of raw data and interview summaries. The FBI file contains its 1997 investigation of the Judges, and it also contains later false and unsubstantiated reports it had received against the Judges, including one such report made by Attorney E.

On October 11, 2001, the ARC turned the FBI files over to Attorney E under the investigative discovery requirements of Colo.R.Civ.P. 251.10 and Colo.R.Civ.P. 45. No notice was given to the Judges that the FBI files had been obtained by the ARC or that they were being turned over to Attorney E. Attorney E filed documents from the FBI files in the Huerfano courts and began distributing copies to Huerfano County residents.

On October 26, 2001, upon learning that the FBI files had been obtained by ARC and turned over to Attorney E, the Judges sought a Protective Order from the Presiding Disciplinary Judge of the Colorado Supreme Court under Colo.R.Civ.P. 251.31(e), (App. C *infra*, pp. 8c-9c). The Presiding Disciplinary Judge entered an interim protective order on October 30, 2001, and set a hearing for November 27, 2001. Following the hearing, on December 18, 2001, the Presiding Disciplinary Judge entered the protective order, *nunc pro tunc* November 27, 2001.

The Protective Order[3] declares the FBI files and information contained therein to be "confidential within the meaning of Colo.R.Civ.P. 251.31(a) and federal law" and that they "remain confidential under Colo.R.Civ.P. 251.10." (Protective Order at 3). The protective order prohibits disclosure of the documents and information "by [Attorney E], Attorney Regulation Counsel, or any other party to this proceeding to any other person or entity without further Order of this Court." (*Id.* at 6). It provides for its automatic expiration upon admission (without further protective orders) of the FBI files in any public proceeding before the Presiding Disciplinary Judge or admission into evidence in any other court or public proceeding,

> provided that the FBI Documents so offered were obtained independently from the production of the documents by the FBI pursuant to the Investigative Subpoena issued by Attorney Regulation Counsel.

(*Id.* at 6). The Protective Order expressly provides that it does not prevent dissemination of the same information and documents, if obtained independently of the ARC's investigative subpoena. (*Id.*)

The Colorado Supreme Court originally refused to hear petitions for review of the Protective Order filed by Attorney E. Then, on December 24, 2001, the ARC filed an original action in the Colorado Supreme Court under Colo.App.R. 21 and Colo.R.Civ.P. 251.1(d) seeking to have the Protective Order vacated. On March 12, 2002, the Colorado Supreme Court issued a Rule to Show Cause why the relief requested by the ARC should not be granted. The March 12, 2002 order also invited Attorney E to intervene

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[3] Attorney E submitted the Protective Order under seal with his Petition for Writ of Certiorari.

and file a brief in support of the ARC's petition or a cross-petition for similar relief.

After issuing an opinion in the matter on June 16, 2003, and modifying it on July 2, 2003, the Colorado Supreme Court withdrew that opinion *sua sponte* on September 4, 2003, tendered a draft final opinion to the parties, and requested their respective comments. (App. B, *infra*). After submitting his comments, and while still awaiting the Colorado Supreme Court decision, on September 30, 2003, Attorney E filed his Petition for Writ of Certiorari even though there was no final judgment of the Colorado Supreme Court. On October 14, 2003, the Colorado Supreme Court issued its final opinion. App. A, *infra.* The Colorado Supreme Court upheld the Protective Order, but with certain specified modifications not at issue here. App. A, *infra* pp. 4a, 25a-27a. The Colorado Supreme Court held, as a matter of Colorado law, that Attorney E is a party to his attorney disciplinary case, including at its investigative stage. App. A, *infra* pp. 14a-17a. It held that the Protective Order does not violate Attorney E's First Amendment rights. App. A, *infra* pp. 18a-25a.

REASONS FOR DENYING THE WRIT

I. The Colorado Supreme Court Did Not Decide Any Federal Question In A Way That Conflicts With Decisions of This Court Or Any United States Court of Appeals.

Attorney E's assertion that the Colorado Supreme Court's holding impermissibly expands the holding in *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984) by creating an "ex post facto prior restraint" is simply erroneous. The Protective Order entered by the Presiding Disciplinary Judge conforms

in its purpose, its scope, and its express limitations to those upheld by this Court in *Seattle Times*.

Additionally, Attorney E's argument that the opinion below conflicts with decisions of this Court and certain federal courts of appeals depends on a fiction that he was a stranger to proceedings in which he received the FBI files. The Colorado Supreme Court's holding that Attorney E is a party to his attorney disciplinary proceeding, even in its investigative stage, is premised upon state law and is not reviewable in this Court. Therefore, there is conflict with decisions with this or other courts and no reason to grant the Petition for Writ of Certiorari.

A. The Protective Order Satisfies the Two-Part Test Announced in *Seattle Times* and, Therefore, Does Not Conflict With Any Decisions of Other Courts.

The Protective Order issued by the Presiding Disciplinary Judge under Colo.R.Civ.P. 251.31(e) satisfies the two-part test for constitutionality set out by this Court in *Seattle Times*. Thus, the Colorado Supreme Court decision affirming its issuance cannot be contrary to the law as made clear by this Court or any other federal appellate courts.

In *Seattle Times*, this Court ruled definitively on the degree of First Amendment scrutiny required of protective orders issued under the "good cause" standard of Rule 26(c) of the rules of civil procedure. As this Court explained, the protective order occupies a unique position in relation to the First Amendment in that information obtained during pretrial discovery is a matter of "legislative grace," and does not constitute a constitutional right. *Id.*, 467 U.S. at 34. But for the broad rules adopted by the legislatures (or the courts)

authorizing the discovery process, certain information provided to litigants during litigation would never be made available to them absent the discovery process. Therefore, "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit. Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." *Id.*, 467 U.S. at 32.

Based on the foregoing rationale, this Court held that "where ... a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict dissemination of the information if gained from other sources, it does not offend the First Amendment." *Id.* at 37. Therefore, a protective order prohibiting dissemination of discovered information prior to trial is not "the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* at 33.

Applying the *Seattle Times* test to the instant case, it is clear that the Protective Order issued here is well within the bounds of constitutionality. First, in a disciplinary proceeding, the government has the same substantial interest, unrelated to the suppression of expression, in ensuring that information coerced from parties and others under the auspices of the court and the discovery rules is not abused. Second, because of the incorporation of the good cause requirement of Rule 26(c) into the attorney discipline process, the standard for issuing a protective order under Colo.R.Civ.P. 251.31(e) is the same as under Rule 26(c)—a showing of good cause. As with a Rule 26(c) protective order, a determination by the presiding authority familiar with facts of the case that the order has been issued for good cause is sufficient to safeguard whatever rights the public possesses in the discovered materials.

Protective orders issued for good cause pursuant to Colo.R.Civ.P. 251.31(e), in connection with attorney disciplinary proceedings, come squarely within the analysis employed in *Seattle Times*. Colo.R.Civ.P. 251.10(b)(2) authorizes subpoenas to be issued to obtain documents in attorney regulation investigations. (App. C *infra*, p. 5c.) Colo.R.Civ.P. 45, incorporated into Colo.R.Civ.P. 251.10 (b)(2), in turn, requires that documents obtained under such a subpoena must be provided to the attorney under investigation. Attorney E thus received confidential FBI documents as a "matter of legislative grace" that he could not have obtained in any other way than the discovery process of his attorney disciplinary proceeding. Under the same "good cause" showing that applies under Rule 26(c), Colo.R.Civ.P. 251.31(e) authorizes protective orders to protect the confidentiality interests "of a complainant, witness, third party, or respondent."

Attorney E's contention that the absence of *a "quid pro quo"* for access to the FBI files distinguishes this case from *Seattle Times* also falls wide of the mark. Indeed, the FBI files were provided to Attorney E not because they constituted public information, but because the ARC issued a subpoena pursuant to Colo.R.Civ.P. 251.10(b)(2) which incorporates Colo. R. Civ. P. 45, pursuant to which ARC was required to produce the FBI files to Attorney E. Attorney E nowhere claims that he attempted to obtain or did obtain the FBI files under any other federal or state law. Protective Order, at 3-4. Therefore, restricting Attorney E's ability to subsequently use documents—that he had no way to acquire other than through attorney discipline discovery procedures—does not "raise the same specter of government censorship" as it might if he had obtained those same documents through means independent of the judicial process. *Seattle Times,* 467 U.S. at 32, 34.

B. The Colorado Supreme Court's Decision Does Not Conflict With Cases Barring Prior Restraints On Publication By Strangers To Court Proceedings.

Attorney E contends that the decision below conflicts with decisions of this Court and various United States courts of appeals that have overturned protective orders against publication of information lawfully obtained about court proceedings. See *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996); *In re Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990) and other cases cited at pp.7-8 of the Petition for Writ of Certiorari. These cases all concern orders (or in some cases statutes) prohibiting publication of information related to court proceedings by media outlets or other strangers to the litigation. They are distinguishable from *Seattle Times* by the fact that information received by persons enjoined from publication did not come to them as parties to litigation by "legislative grace."

Rather, information sought to be published was in some cases leaked by the parties to the media, as in *Procter & Gamble*, 78 F.3d at 222-223, or was revealed in open court, as in *Oklahoma Publishing*, 430 U.S. at 309, and *Charlotte Observer*, 921 F.2d at 48-49. None of these cases involve information that had been received by parties through discovery and that they would otherwise have had no right to obtain. Moreover, the protective order at issue in *Procter & Gamble* had not been obtained "on a showing of good cause as required by Rule 26(c)," *Seattle Times*, 467 U.S. at 37, but it had been entered on the stipulation of the parties who determined by themselves, and without participation of the court, which documents would be

protected and which would not. *Procter & Gamble*, 78 F.3d at 222; see *Id.* at 227 (discretion to issue protective orders is limited by Rule 26, and courts may not abdicate their responsibilities under Rule 26 to the parties).

Attorney E's reliance on these cases depends on the fiction that he, too, was a stranger to proceedings in which he obtained the FBI files. Despite the process in which he participated, he pretends to be the unlikely recipient of documents that are protected only within a context in which he played no part. Attorney E also argued to the Colorado Supreme Court that the Protective Order did not come within the *Seattle Times* exception to First Amendment strict scrutiny because, Attorney E contended, he was not a "party" to the proceeding in which the documents were obtained. Thus, he contended, any confidential nature of the documents was lost when the documents were turned over to him.

The Colorado Supreme Court, however, rejected Attorney E's arguments, and held, as a matter of Colorado law, that Attorney E was a "party" to the proceedings in which the FBI files were provided and that, as in *Seattle Times*, he received the FBI files pursuant to the requirements of discovery rules applicable to his case. Opinion Below, App. A *infra*, pp. 14a-17a. Accordingly, Attorney E's receipt of the FBI files was a matter of the Court's grace in connection with a disciplinary proceeding that was itself in a confidential phase of an investigation contemplated by Colo.R.Civ.P. 251.10. *See* Colo.R.Civ.P. 251.31(b); Opinion Below, n.2, App. A *infra*, p.3a.

In sum, the Colorado Supreme Court has neither expanded the holding in *Seattle Times*, nor is the Colorado Supreme Court's decision in conflict with any other court on any important matter of federal law. Crucial elements on which Attorney E seeks review, the confidential nature of the

attorney disciplinary proceeding and Attorney E's status as a party to the proceeding are matters of Colorado law. Thus, there is no compelling reason for this Court to review the decision of the Colorado Supreme Court. The opinion below and the Protective Order that it substantially upholds fit squarely within the limitations on First Amendment rights recognized in *Seattle Times v. Rhinehart.*

II. There Is No Need For This Court To Exercise Its Supervisory Authority In This Case Because The Protective Order Regulates Only Prospective Dissemination of Confidential Information.

Attorney E contends that the Protective Order reaches out to "recall information from the public domain." Petition for Writ of Certiorari at pp. 7-8. He further argues that a Protective Order which mandates a retraction of information already in the public domain constitutes an "*ex post facto*" restriction on speech. These assertions are contradicted by the language in the Protective Order.

As a threshold matter, nothing in the Protective Order purports to extend to persons who were not parties to the attorney discipline investigation through which the documents were tendered. On the contrary, the Protective Order expressly does not extend to information received from other sources and terminates by its own terms in the event that the FBI files are admitted into evidence. Protective Order at 6.

Moreover, far from requiring information to be recalled from the public domain, the Protective Order reflected the impossibility of that circumstance, and found instead that "*further* dissemination of the FBI Documents by [Attorney E] would be wrongful and would cause further

harm to the [Judges] and the other persons named in the FBI Documents." Protective Order at p.7 (emphasis added). The Presiding Disciplinary Judge then recognized the Protective Order's inherent limitations by acknowledging that "[a]lthough the Court has no power in the context of this Petition for Protective Order to remedy any harm already caused by [Attorney E's] dissemination of the FBI Documents, Colo.R.Civ.P. 251.31(e) specifically grants power to the Court to prevent *further* harm as a result of *further* dissemination." *Id.* (emphasis added). In addition, the Protective Order expressly limited its reach and ordered that the FBI documents "shall not be *further* disclosed by [Attorney E], Attorney Regulation Counsel or any other party to this proceeding. . . . ." *Id.* at p. 9. (emphasis added).

As made clear by its plain language, the Protective Order was limited to prohibiting additional publication of the confidential documents by the parties to the proceeding, including Attorney E. The Protective Order neither requires any party to recall the information previously published, nor regulates the conduct of individuals that were not parties before the Presiding Disciplinary Judge. Finally, the Protective Order terminates automatically once the FBI files are admitted into evidence in any public proceeding in any court. Accordingly, the Protective Order does not constitute an *ex post facto* restriction on speech, since the directives provided by it apply only to future conduct of the parties before the Presiding Disciplinary Judge.

Therefore, there is no need for this Court to exercise its supervisory powers in this case. Attorney E has interpreted the Protective Order in a manner that is contrary to its terms. The Protective Order and the decision of the Colorado Supreme Court upholding it comport with the strictures of *Seattle Times*. The Protective Order does not extend beyond what is reasonable and necessary to protect

the Judges interest in FBI files that are confidential as a matter of federal and state law.

CONCLUSION

For the reasons and upon the authorities set forth above, Respondents, Third Party Movants for Protective Order, request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Original Proceeding in Discipline Pursuant to C.A.R. 21 and C.R.C.P. 251(d) Case No. 01PDJ098 Honorable Roger L. Keithley, Presiding Disciplinary Judge	Case No. 01SA404
In Re: IN THE MATTER OF THE REQUESTS FOR INVESTIGATION OF ATTORNEY E.	
PRIOR OPINION OF JUNE 16, 2003, WITHDRAWN, SUA *SPONTE.* RULE MADE ABSOLUTE IN PART AND DISCHARGED IN PART EN BANC October 14, 2003	

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JUSTICE KOURLIS delivered the Opinion of the Court. CHIEF JUSTICE MULLARKEY and JUSTICE BENDER do not participate.

I. Introduction

In this original proceeding1 we construe our rules governing the investigative phase of our attorney regulation system. We hold that the attorney, who is the target of the investigation, is a "party" to the investigative proceedings. Because our rules governing discovery by the Attorney Regulation Counsel incorporate certain provisions of the rules of civil procedure, Attorney Regulation Counsel must provide the target attorney with notice of the subpoenas and copies of the subpoenaed documents. In addition, we affirm the Presiding Disciplinary Judge's protective order directing that documents subpoenaed from the FBI by Attorney Regulation Counsel be treated as confidential. We hold that this protective order does not

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1 Justice Bender authored the opinion first announced in this case. The court withdrew that opinion sua sponte. The court then transmitted copies of proposed changes in the opinion to the parties for comment and has taken those comments into account. After the proposed modifications were sent out, Justice Bender recused himself from the case based upon an inadvertent ex parte contact. Justice Kourlis now issues the opinion.

violate the targeted attorney's First Amendment rights. However, on remand we direct the Presiding Disciplinary Judge to modify the terms of the protective order to permit both parties to this disciplinary proceeding, Attorney Regulation Counsel and the targeted attorney, to use the documents to further their respective cases provided neither discloses the existence of the documents themselves nor informs any witnesses that the information came from the confidential FBI documents. However, if either party finds it necessary and essential to their respective cases to disclose to witnesses that certain information comes from the confidential documents, they may apply to the Presiding Disciplinary Judge for a modification of the protective order to permit such disclosure.

Attorney Regulation Counsel ("ARC") was investigating allegations of misconduct regarding the target attorney, "Attorney E."2 During the investigation, ARC subpoenaed FBI documents. As mandated by the disciplinary and discovery rules of civil procedure, ARC provided copies of those documents to Attorney E as the party to the investigative proceedings. When Attorney E publicly disclosed the documents and implicated privacy interests of third parties named in the documents, the third parties obtained a protective order from the Presiding Disciplinary Judge ("PDJ"). The PDJ noted that the rules provide that the investigative stage of a disciplinary proceeding is confidential until ARC files a formal, public complaint with the PDJ. Hence, the PDJ reasoned that the subpoenaed FBI documents were also confidential, even to the attorney under investigation. The PDJ concluded that ARC erred by providing the FBI documents to Attorney E and prohibited

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2 These proceedings and the attorney under investigation remain confidential under our disciplinary rules. See C.R.C.P. 251.31.

further disclosure of the documents or their contents by either ARC or Attorney E unless either party obtained the information from an independent source or until any person filed the documents in a public proceeding. Both ARC and Attorney E petitioned this court to have the protective order vacated.

We issued a rule to show cause why the petitioners' relief should not be granted and now make the rule absolute in part and discharge it in part. We affirm the issuance of a protective order to protect the privacy interests of third parties but remand to the Presiding Disciplinary Judge with directions to modify the terms of the protective order consistent with this opinion.

II. Facts and Proceedings Below

Because certain information in this disciplinary proceeding remains subject to a protective order, we provide only those facts which are pertinent to the resolution of this case.

ARC was investigating two matters involving Attorney E. Both matters concerned, in part, statements Attorney E made about two Colorado judges. Specifically, Attorney E asserted that the judges had engaged in criminal misconduct.

During ARC's investigation, a witness stated that the FBI had investigated and developed evidence of the judges' misconduct.3 ARC issued investigative subpoenas to the FBI requesting any reports in that agency's records pertaining to the investigation of the judges pursuant to ARC's authority under C.R.C.P.

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3 The United States Attorney for the District of Colorado declined the case and the investigation was terminated with no further proceedings.

251.10(b)(2). Rule 251.10(b)(2) incorporates Rule 45, which in turn incorporates specific discovery provisions of Rules 26 and 30.4 Following those rules, ARC sent a notice of its record deposition to Attorney E as the

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4 C.R.C.P. 251.10(b)(2) provides in relevant part:

(b) Procedures for Investigation.

(2) Procurement of Evidence During Investigation.

. . . In connection with an investigation of allegations made against an attorney . . . the Regulation Counsel may issue subpoenas to compel . . . the production of pertinent . . . papers [and] documents, or other evidence in proceedings before the Investigator. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. (emphasis added).

C.R.C.P. 45 provides in relevant part:

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein . . . .

(c) Service . . . . The party issuing or causing the issuance of the subpoena pursuant to this rule, except in postjudgment proceedings, shall serve a copy of the subpoena . . upon all parties of record . . . . (emphasis added).

(d) Subpoena for Taking Depositions; Place of Examination.

(1) A Deposition subpoena, upon notice to all parties to the action, may require the production of documentary evidence which is within the scope of discovery permitted by Rule 26. (emphasis added).

C.R.C.P. 26 provides in part:

(a)(1) Disclosures. . . . [A] party shall, without awaiting a discovery request, provide to other parties: (B) A. copy of .. all documents .. in the possession, custody, or control of the party that are relevant to disputed facts . . . . (emphasis added).

"party" to the investigative proceedings. Because Attorney E was also entitled to the documents themselves as a party to the proceedings, ARC forwarded him copies that had been redacted by the FBI.

Although Attorney E's allegations concerned both judges, the primary FBI investigation centered on one of the judges. After receiving the FBI documents describing the investigation of the judge for alleged criminal misconduct, Attorney E publicly distributed the FBI documents by filing them in various courts of record. Following the public disclosure, the judges filed petitions with the PDJ under C.R.C.P. 251.31 seeking a protective order5 classifying the

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5 C.R.C.P. 251.31 provides:

(a) Availability of Information. Except as otherwise provided by these rules, all records, except the work product, deliberations and internal communications of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, the Hearing Boards, and the Supreme Court shall be available to the public after the committee determines that reasonable cause to believe grounds for discipline exists and the Regulation Counsel files and serves a complaint . . . . (emphasis added).

Unless otherwise ordered by the Supreme Court or the Presiding Disciplinary Judge, nothing in these rules shall prohibit the complaining witness, the attorney, or any other witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons. (emphasis added).

(b) Confidentiality. Before the filing and service of a complaint . . . the proceedings are confidential within the Office of Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court, except that the pendency, subject matter, and status of an investigation may be disclosed by the Regulation Counsel if:

(1) The respondent has waived confidentiality;

FBI documents as "confidential" and limiting Attorney E's use of them.

In response to the judges' petition, the PDJ issued a protective order. In his order, the PDJ ruled that the FBI documents were "confidential" under the various subsections of 251.31.6 The PDJ reasoned that unless and until ARC files a formal complaint, the investigations of ARC were confidential even to the target of the investigation. Because Attorney E, as the target of the investigation, was not a "party" to the proceedings until ARC initiated the complaint process, C.R.C.P. 251.10 did not require or authorize ARC to provide Attorney E or anyone else with confidential

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(2) The proceeding is based upon allegations that include either the conviction of a crime or discipline imposed by a foreign jurisdiction;

(3) The proceeding is based on allegations that have become generally known to the public; or

(4) There is a need to notify another person or organization, including the fund for client protection, to protect the public, the administration of justice, or the legal profession. (emphasis added).

(e) Protective Orders. To protect the interests of a complainant, witness, third party, or respondent, the Presiding Disciplinary Judge or a Hearing Board, may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential . . . . (emphasis added).

6 The PDJ also concluded that the FBI documents were "confidential" by virtue of the federal Freedom of Information Act, 5 U.S.C. § 552 and the Federal Privacy Act, 5 U.S.C. § 552(a). Because the two judges named in the FBI documents appropriately sought a protective order under C.R.C.P. 251.31(e), we decline to analyze this Colorado disciplinary case under either the Freedom of Information Act or the Federal Privacy Act.

documents obtained pursuant to the subpoena. Accordingly, the PDJ prohibited not only Attorney E but also ARC from further use of the FBI documents or the information contained within the documents without an order of the court. The PDJ concluded that the protective order did not prevent any person acquiring the same information from an independent source from disclosing such information or any person from disclosing the information once it was filed in a public proceeding.

In response to the PDJ's protective order, ARC petitioned this court pursuant to C.A.R. 21 and C.R.C.P. 251.1(d)7 to have it vacated for three reasons. First, ARC argued that the order misconstrued ARC's obligations when an investigative subpoena is issued. Second, it overextended the concept of confidentiality in Rule 251.31. Third, the order hindered ARC's investigation of Attorney E by unduly limiting the purposes to which the FBI documents may be put. Attorney E also filed a motion for leave to intervene in support of ARC's petition, arguing that the protective order violated his First Amendment right to free speech.8

We granted ARC's petition under C.A.R. 21 and 251.1(d) and Attorney E's motion to intervene and issued a rule to show cause why the petitioners' relief should not be

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7 C.R.C.P. 251.1(d) states:

(d) Plenary Power of the Supreme Court. The Supreme Court reserves the authority to review any determination made in course of a disciplinary proceeding and to enter any order respect thereto, including an order directing that further proceedings be conducted as provided by these Rules.

8 Attorney E filed a Petition for Writ of Certiorari to the United States Supreme Court regarding the PDJ's protective order. The U.S. Supreme Court denied the Petition in June 2002.

granted. As a result, the protective order remained in effect but the underlying disciplinary proceedings against Attorney E were stayed pending our resolution of the issues.

We now hold that Attorney E is a "party" to ARC's investigation proceedings and as such, the protective order does not violate his First Amendment rights. As background for our discussion of these issues, we briefly review the investigation stage of the attorney regulation system.

III. The Investigation Stage of the Attorney Regulation System

The investigation of allegations against an attorney proceeds as follows.9 Once ARC makes the determination to investigate an attorney, it provides the attorney in question with written notice of the nature of the allegations. C.R.C.P. 251.10(a). The attorney must respond to the allegations in writing. Following the attorney's response, the case is assigned to an ARC investigator. Id. Once ARC initiates the investigation, the target attorney has a duty to cooperate and participate throughout the investigation. C.R.C.P. 251.5(d); In re Weisbard, 25 P.3d 24, 28 (Colo. 2001).

ARC has broad powers to procure evidence during the investigation. See C.R.C.P. 251.10(b)(2). ARC may issue subpoenas to compel the attendance of witnesses, including the attorney in question, for investigative proceedings. ARC may also issue a subpoena for the production of documents (a subpoena duces tecum) to obtain pertinent books, papers, documents or any other evidence pertinent to the investigation. While ARC's investigative powers are not

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9 Colorado's attorney regulation system also includes a formal complaint stage. See C.R.C.P. 251.12, 251.14.

subject to all of the rules of civil procedure.10 they are subject to certain discovery rules because of the express incorporation of C.R.C.P. 45.

C.R.C.P. 45 allows, among other things, ARC to subpoena documents in the hands of a nonparty so long as it follows the formal requirements of the rule. C.R.C.P. 45(b). Those requirements mandate that the person issuing the subpoena must serve a copy of the subpoena, including a complete list of documents and things requested to be provided pursuant to the subpoena, upon all "parties of record." C.R.C.P. 45(c). Rule 45 does not permit a person to subpoena documents by themselves; rather, the items may be sought only in connection with a subpoena for a deposition.11 4 Sheila K. Hyatt & Stephen A. Hess, Colorado Civil Rules Annotated § 45.3 (3rd ed. 1998). Rule 45 is also subject to Rule 26, which requires that parties receive copies of all documents that are "relevant to disputed facts" in the proceedings. C.R.C.P. 26(a)(1)(B).

Following the specific discovery rules of civil procedure found in Rules 45, 30, and 26, when ARC issues a deposition subpoena for documents, it serves a copy of the subpoena on the attorney under investigation as the "party" and provides copies of the documents. Such disclosure of documents from ARC to the attorney under investigation is consistent not only with the discovery rules but also with the confidentiality provisions of Rule 251.31, which provide that only the "proceedings" are confidential. ARC has also historically interpreted the provisions of Rule 251.10(b)(2),

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10 For example, disciplinary hearings must be conducted in conformity with the Colorado Rules of Civil Procedure and the Colorado Rules of Evidence. C.R.C.P. 251.18(d).

11 Under C.R.C.P. 30, a litigant may depose a third party and compel the production of documents following the requirements C.R.C.P. 45.

and its predecessor Rule 241.10, to require a similar result.

Rule 241.10 also incorporated Rule 45 and thus the discovery obligations of the disciplinary investigator have not changed. See C.R.C.P. 241.10. The Office of Disciplinary Counsel, the predecessor to ARC, always gave the attorney under investigation notice of any investigatory subpoena related to the attorney's case and copies of any documents obtained in the investigative process. The reasons for this practice were fairness and privacy. For example, ARC frequently subpoenas personal, medical, and business records from an attorney during the investigation. Such records implicate the attorney's right of privacy. See People v. Lamb, 732 P.2d 1216, 1220 (Colo.1987); Benson v. People, 703 P.2d 1274, 1280 n.7 (Colo. 1985). As a matter of long-standing procedure and practice, therefore, when ARC issues document subpoenas, it provides notice of the subpoena and copies of the documents to the attorney under investigation.

Once the attorney under investigation receives such documents, he or she may use them in various ways. For example, the attorney may review them to determine the strength of the case and whether he or she should offer a "conditional admission". C.R.C.P. 251.10(b)(4). A conditional admission occurs when ARC and the attorney under investigation agree upon a conditional admission of misconduct in lieu of a formal complaint when the form of discipline is no greater than a private admonition. Id. Such admissions promote one of the goals of the attorney discipline system: the speedy and informal resolution of minor misconduct.12

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12 This court substantially reorganized and revised the attorney discipline system rules in 1999. One of the important changes was to provide alternatives to discipline to permit the diversion of

The accused attorney may also disseminate the documents and the information contained within the documents to the public according to the provisions of Rule 251.31(a) and (b). Under Rule 251.31(b), the confidentiality provisions apply only to the "proceedings." There is no separate confidentiality provision for investigation documents.

The second paragraph of Rule 251.31(a) explicitly allows the attorney under investigation, the complaining witness, and any other witness to the investigative proceedings to disclose the existence of disciplinary proceedings or to disclose any documents or correspondence served on or provided to these persons. C.R.C.P. 251.31(a). Thus, the disciplinary rules explicitly allow the participants in the investigation -- the accused attorney, the complaining witness, and any other witness -- to disclose the existence of the investigative proceedings and documents before ARC files a formal, public complaint against the accused attorney.13

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certain cases of minor misconduct so as to avoid formal complaint proceedings. See C.R.C.P. 251.13.

13 There is no such public disclosure provision for ARC. However, before the filing of a complaint, ARC may disclose the pende.ncy, subject matter, and status of an investigation to the public in four situations:

(1) The respondent [attorney under investigation] has waived confidentiality;

(2) The proceeding is based upon allegations that include either the conviction of a crime or discipline imposed by a foreign jurisdiction;

(3) The proceeding is based on allegations that have become generally known to the public; or

The ability of the accused attorney to disclose documents received from ARC is consistent with the goals of the revised attorney discipline system. Before the enactment of our current rules, the accused attorney could not disclose such documents or the existence of grievance proceedings unless permitted to do so by this court.14 One of the major goals of the amendments was to make the system of attorney discipline more publicly visible.15 Thus, the "confidentiality" provisions of the old system were greatly reduced by the new discipline system. The ability of the accused attorneys and witnesses to the investigative proceedings to disclose information if they choose reflects this goal of visibility.

The ability of the accused attorney, the complaining witness, or any other witness to disclose information or documents received from ARC during an investigation, however, is not unlimited. To protect the interests of a

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(4) There is a need to notify another person or organization, including the fund for client protection, to protect the public, the administration of justice, or the legal profession. C.R.C.P. 251.31(b).

14 Prior to 1999, it was a disciplinary offense for an attorney to disclose pending grievance proceedings in the absence of an order granting such disclosure C.R.C.P. 241.24 (1998); People v. Bottinelli, 782 P.2d 746, 751 (Colo. 1989) (discussing confidentiality provisions of C.R.C.P. 241.24).

15 The Attorney Regulation System Planning Committee, evaluating changes to the disciplinary rules, reported to this court that the system of attorney discipline in Colorado must meet the major goal of providing a fair, efficient, and visible process to resolve complaints charging attorneys with misconduct. See 1997 Report of the Colorado Attorney Regulation System Planning Committee, Public Hearing, February 23, 1998, 27 Colo. Lawyer 2, 23 (Feb. 1998).

complainant, witness, third party, or the accused attorney, any person may petition the PDJ for a protective order upon a showing of good cause. C.R.C.P. 251.31(e). Such orders prohibit the disclosure of information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order. Id. Rule 251.31(e) is consistent with the power of the court to issue a protective order under C.R.C.P. 26(c), which precludes dissemination of discovery information, upon good cause shown, to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Having reviewed the attorney discipline rules and their incorporation of the discovery rules of civil procedure during the investigation stage, we turn to the application of these rules to this case.

IV. The Attorney Regulation System Authorized and Required Attorney Regulation Counsel to Provide Attorney E with Notice of the Investigative Subpoena and the Subpoena Documents Because Attorney E Is a Party to the Proceeding

Initially, we must determine whether Attorney E is a "party" to the investigative proceedings and thus entitled, as required by the specific discovery provisions of the rules of civil procedure, to notice of its subpoenas and the subpoenaed documents themselves. The PDJ's protective order concludes that he is not a party. The PDJ reasoned that ARC's subpoena for the FBI documents was issued under ARC's investigation powers pursuant to Rule 251.10. Under the confidentiality provisions of Rule 251.31, any documents obtained during an investigation are confidential, even from the attorney under investigation. Thus, even though Rule 251.10 refers specifically to C.R.C.P. 45 -- which provides the

discovery requirements and obligations for parties -- the PDJ concluded that the investigative confidentiality rule supercedes the disclosure requirements of Rule 45 and the related discovery provisions.

We disagree. The PDJ's interpretation would render many of the disciplinary rules meaningless and prevent the accused attorney from participating fully in his or her investigation -contrary to the mandates and intent of our attorney regulation system. People v. Cooper, 27 P.3d 348, 354 (Colo. 2001) ("Our fundamental responsibility in interpreting a statute is to give effect to [its] purpose or intent . . . ."). Thus, we hold that Attorney E is a party to the investigative proceedings.

The rules authorize and require the actions ARC took in its investigation of Attorney E. Pursuant to its broad investigative powers under Rule 251.10(b)(2), ARC subpoenaed the documents describing the FBI's investigation. ARC reasonably believed that such documents would shed light on its investigation of Attorney E's accusations. Rule 251.10(b)(2) is subject to the discovery requirements of Rule 45, and thus ARC had no choice but to follow the specific provisions of Rule 45.

Rule 45 mandates that persons serving subpoenas must provide notice of such subpoenas to all "parties" and incorporates the discovery provisions of Rule 26(a)(1)(B). Rule 26(a)(1)(B) requires that parties receive copies of all relevant documents. Thus, ARC provided Attorney E with notice of its deposition subpoena to the FBI and the documents produced as a result of that subpoena.

If the attorney under investigation is not entitled to notice and the documents, then the explicit incorporation of Rule 45 into Rule 210.10 becomes meaningless. See Colorado Common Cause v. Coffman, 2003 WL 1562241 at *5 (Colo. App. March

27, 2003). See also State v. Nieto, 993 P.2d 493, 501 (Colo. 2000).

Other provisions of the disciplinary rules are similarly superfluous if Attorney E is not entitled to the subpoena documents. For instance, the power of the attorney under investigation to disclose investigative documents to the public pursuant to Rule 251.31(a) would be moot if ARC were precluded from providing those documents to the attorney in the first place. Such a result would be contrary to one of the main goals of the recent revisions of the rules: to allow liberal disclosures of information so as to provide a visible attorney discipline process.

The duty of the attorney to participate in his or her own investigation is also hindered significantly if the attorney does not have access to relevant documents until the investigation is completed and ARC files a formal complaint. To cooperate and participate in the investigative process, a respondent attorney must have meaningful access to the investigative documents and the evidence that form the substance of the investigation. Without an exchange of investigative information between ARC and the attorney under investigation, the attorney is not likely to pursue an informal resolution of the case or agree to a conditional admission. Without all of that information, the attorney would not be able to make informed decisions about any admissions. In addition, the attorney would be hindered in presenting arguments and evidence to the ARC investigator that the allegations against him or her were meritless or constituted a minor violation of the rules. The result would be to force matters into the formal proceeding stage when early sharing of information otherwise might result in early resolution at a lesser expense to both parties. Such a result would conflict with one of the goals of the system: an efficient, speedy, and fair resolution of minor

misconduct. Given the plain language of the rules, ARC's present and historic interpretation of those rules, and the implications of a contrary interpretation that would render other rules in our attorney discipline system moot and create a secretive system that discourages informal resolution of discipline claims, we conclude that Attorney E was a "party" in his own investigation.16 Thus, ARC appropriately followed the specific provisions of Rules 45, 26(a)(1)(B), and 30 by providing the attorney with notice of its subpoena and the documents produced from that subpoena.

V. The Protective Order

Having determined that Attorney E is a party in his own investigation and thus entitled to copies of the FBI documents, we address the terms and provisions of the protective order. Unquestionably, apart from the "confidentiality provisions" of Rule 251.31(a) and (b), the PDJ has the power to issue an order limiting the dissemination of information to protect the interests of third parties for good cause shown. C.R.C.P. 251.31(e). See also C.R.C.P. 26(c).

Pursuant to C.R.C.P. 251.31(e), the PDJ held that "good cause" was shown in this case for the issuance of a

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16 Although we conclude that the respondent attorney, Attorney E, is a "party" to the investigative proceedings and thus entitled to notice and copies of any subpoenaed documents under the specific provisions of Rules 45, 26, and 30, we do not imply that our rules empower the respondent attorney with the formal discovery powers of a party under the rules of civil procedure during the investigation stage. While Rule 210.10 grants ARC specific investigative powers that must comply with the discovery rules, there exists no similar provision for the accused attorney during the investigation phase.

protective order. The PDJ reasoned that Attorney E's continued dissemination of documents describing the investigation of the judges' alleged misconduct posed a significant and substantial risk to the continued privacy of the two judges, other persons named in the documents, and the judicial system. The PDJ concluded that such a risk to privacy interests was compelling here because the United States Attorney had declined to file charges in response to the FBI investigation.

Neither ARC nor Attorney E appealed the PDJ's "good cause" ruling pursuant to 251.31(e) and thus did not in that context provide any record of what the FBI documents contained so we could independently evaluate them. Thus, we must assume for purposes of this case that the "good cause" standard of C.R.C.P. 251.31(e) was satisfied and a protective order was appropriate.

We focus, therefore, on the breadth of the protective order and the specific questions presented by Attorney E and ARC:

(1) Whether the order violates Attorney E's First Amendment rights because it is a prior restraint on his speech? and,

(2) Whether the order unduly prohibits ARC and Attorney E from prosecuting and defending, respectively, their cases? We turn to a discussion of each issue.

A. Protective Order Does Not Violate Attorney E's First Amendment Rights

Attorney E argues that he is not a party to the investigative proceedings and thus did not receive the documents as a result of discovery. Because he is not a party in the investigative proceedings, he concludes that the order constitutes an ongoing unconstitutional prior restraint on his

speech. In the alternative, Attorney E argues that even if he were a party to the investigation, the protective order placed restrictions on information after it was released to the public and such ex post facto prior restraints are unconstitutional. We disagree.

Prior restraints on speech are the most serious and least tolerable infringement on First Amendment rights. Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976). As the Supreme Court has frequently held, there is a heavy presumption against the constitutional validity of any prior restraint. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). A court order that prevents speech from occurring could comprise such a prior restraint. Near v. Minnesota, 283 U.S. 697, 713 (1931).

However, an order prohibiting parties to a case from disseminating discovered information before it is revealed at a public proceeding is not the kind of "classic prior restraint" that triggers exacting First Amendment scrutiny. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984); Bowlen v. District Court, 733 P.2d 1179, 1182-83 (Colo. 1987). As the Supreme Court held in Seattle Times, such parties do not have an unrestrained right to disseminate information that they obtained only through the processes of our liberal discovery system. Seattle Times, 467 U.S. at 31.

In Seattle Times, the defendant newspaper wanted to publish financial information it obtained through discovery about the plaintiff, a religious organization. The plaintiff obtained a protective order under the "good cause" standard of Rule 26 under the Washington Rules of Civil Procedure 17 because it alleged that publishing such information would adversely affect their membership and subject them to

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17 Wash. C.R. 26(c) is nearly identical to C.R.C.P. 26(c) and requires the same "good cause" showing as does C.R.C.P 251.31(e).

harassment Id at 22-27. The United States Supreme Court unanimously upheld the protective order and rejected the defendant's First Amendment challenge.

As background to its unanimous ruling, the Court described our liberal process of discovery and the interplay between pretrial protective orders and the First Amendment. The Court explained that discovery rules often allow extensive intrusion into the affairs of both litigants and third parties. For example, as in this case, a litigant can compel a third party to be deposed and to produce tangible evidence Id. at 30.

Such discovered information would rarely fall within the classes of unprotected speech. However, even if there is some public interest in knowing about the information, it does not necessarily follow that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery Id. at 31.

The Court reasoned that because discovery rules were adopted by the state legislature, the processes therein are a matter of "legislative grace." Id. at 32. A party has no First Amendment right to access information made available only for purposes of trying his or her case. Thus, "continued court control" over the discovered information in the form of protective orders does not raise the "same specter of government censorship that such control might suggest in other situations." Id.

To reflect the reduced level of First Amendment scrutiny applicable to protective orders that limit the dissemination of discovery information, the Court announced a two-part balancing test that weighs the free speech right of litigants against the governmental interest of prohibiting the dissemination of discovery material. The test considers whether the practice in question furthers an important or substantial governmental interest unrelated to

the suppression of speech and whether the limitation of First Amendment freedoms is no greater than necessary and essential to the protection of the particular governmental interest involved. Id.

Applying this test, the Supreme Court upheld the protective order at issue because it satisfied the "good cause" requirements of Rule 26.

First, the Court held that Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of speech Id. at 34. Because of the full disclosure provisions of the rules, it is necessary for the trial court to have authority to issue protective orders. Pretrial discovery has a significant potential for abuse, particularly because it may seriously implicate the privacy interests of third parties. Although Rule 26(c) contains no specific reference to "privacy," the Court explained that privacy interests are implicit in the broad purpose and language of the Rule. Id. at 35 n.21. Thus, the government has a substantial interest in preventing abuse of its discovery process under Rule 26 to protect such privacy interest Id. at 34-35.

Second, the Court held that the protective order issued pursuant to Rule 26(c) did not limit First Amendment freedoms of the parties to a greater extent than necessary, and that they were essential to the government's interest in the protection of privacy. The order in the case prevented a party from disseminating only information obtained through the discovery process. If the party obtained the same information independently of the court's processes, the order did not preclude the party from disseminating such information Id. at 34, 36. The Court concluded that because the protective order at issue was entered on a showing of good cause under Rule 26, was limited to the context of pretrial discovery, and did not restrict the dissemination of the information if gained from other sources, it did not offend the First Amendment Id.

at 37.

We applied the Seattle Times analysis in Bowlen. 733 P.2d at 1182. In Bowlen, we reviewed a protective order issued by a lower court under the "good cause" standard of C.R.C.P. 26(c). Because the United States Supreme Court held in Seattle Times that the "good cause" showing required under Rule 26 was sufficient to safeguard whatever rights the public possesses in discovery materials, we found it unnecessary to address the extent to which discovery proceedings may implicate the First Amendment. Id. We concluded that even if a matter is of public interest, rather than a private affair between litigants, C.R.C.P. 26(c) and Seattle Times permit the trial court to protect private affairs from public disclosure until the material is admitted in a public proceeding Id. at 1183. Following the analysis of Seattle Times and Bowlen, we conclude that the protective order issued in this case pursuant to C.R.C.P. 251.31(e) for "good cause" shown does not offend the First Amendment. Although there may be a legitimate public interest in an FBI investigation of two judges because of their positions as governmental officials, we hold that the two-part balancing test weighs in favor of the protective order.

First, Rule 251.31(e) furthers a substantial governmental interest unrelated to the suppression of speech. Because of the specific disclosure rules that are incorporated into our attorney discipline system, the PDJ must and does have authority to issue orders that protect third-party privacy interests. Seattle Times, 467 U.S. at 34-35; Bowlen, 733 P.2d at 1183. In this case, the FBI documents obtained by Attorney E solely as a result of the discovery process implicate the type of privacy interests inherent in the broad purpose and language of the Rule. The documents described the FBI's investigation. Such documents clearly implicate the judges' privacy interests and have a significant potential for abuse, particularly in this case where Attorney E is under

investigation himself for statements he made against the judges. Thus, the government has substantial interests in preventing Attorney E from further abusing the discovery processes and in protecting the judges' privacy. Second, the PDJ's protective order did not limit Attorney E's First Amendment freedoms to an extent greater than necessary to protect the judges' privacy interests. The order in the case prevented Attorney E -- as a party to the investigative proceedings -- from disseminating information obtained from the FBI documents only during ARC's pre-complaint stage. Seattle Times, 467 U.S. at 36. If he obtained the same information outside of his attorney discipline case, the PDJ's order does not preclude him from disseminating such information Id. at 37. Thus, we conclude that under both the two-pronged balancing test of Seattle Times and the "good cause" showing required under Rule 251.31(e), the protective order in this case does not violate Attorney E's First Amendment rights. Bowlen, 733 P.2d at 1183.

We are also not persuaded by Attorney E's ex post facto argument that his First Amendment rights are offended because, even if he is a party to the investigative proceedings and received the FBI documents as a result of discovery, he originally obtained the documents without the restrictions of the protective order.

As the United States Supreme Court held in Seattle Times, a trial court has the power of "continued control" over discovered information and such control does not raise the "same specter of government censorship that such control might suggest in other situations." 467 U.S. at 32. Such continued control necessarily implies that protective orders may be issued at any time during the discovery process. The trial court is in the best position to weigh fairly the

competing needs of litigants and third parties affected by discovery and thus must have substantial latitude to fashion protective orders when the need arises. Seattle Times, 467 U.S. at 36.

The PDJ may exercise "continued control" and broad discretion over the discovery process and limit Attorney E's use of the FBI documents after he disseminated them. Attorney E received the FBI documents due to the "legislative grace" of the state's discovery provisions. Hence, the state, through the PDJ, may prevent abuse of its discovery process at any point that good cause is shown. Arguably, because of the privacy interests implicated by the FBI documents, ARC should have moved for a protective order prior to its disclosure of the documents to Attorney E.18. Although ARC failed to take such steps, we find that good cause still exists to prevent Attorney E, as a party to the investigative proceedings, from further disclosure of the FBI documents.

Indeed, the primary case cited by Attorney E in support of his ex post facto argument, Procter and Gamble Co. v. McGrawHill Co., 78 F.3d 219 (6th Cir. 1996), does not apply here. Procter presents the classic prior restraint issue that requires exacting First Amendment scrutiny: whether a court can subject the press, not a party to the litigation, to a prior restraint on publication of discovery material that it lawfully received Id. at 221. As the Sixth Circuit explained in striking down the lower court's protective order, such a prohibitive practice is contrary to

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18 ARC stated that Attorney E gave no warning that he planned to disseminate the FBI documents. Given the nature of the FBI documents and Attorney E's past statements about both judges, ARC could have petitioned the PDJ for a protective order to protect the interest of the judges as "third parties" under C.R.C.P. 251.31(e).

the First Amendment's guarantee of freedom of the press and is always unconstitutional absent exceptional circumstances Id. at 225.

Such is not the case here. Although Attorney E "lawfully received" the discovery information unrestricted, he is a party to the investigative proceedings and thus information he received only through the process of discovery in such proceedings may be properly restricted upon a showing of good cause. C.R.C.P. 251.31(e).

Thus, based upon Seattle Times and Bowlen, we conclude that the protective order in this case does not violate Attorney E's First Amendment rights.

B. The Protective Order Must be Modified Because it Unduly Hinders both ARC and Attorney E's Ability to Further Their Respective Cases

Having addressed the First Amendment issue, we turn to the practical effects of the protective order on the underlying investigation of Attorney E. ARC argues that if the protective order is allowed to stand, it will not be able to use any of the statements made in the FBI documents, or the documents themselves, to question witnesses, or otherwise as a basis for further investigation without further order from the PDJ. Attorney E argues that the protective order precludes him from interviewing or investigating sources of potentially exculpatory evidence without running the risk of being held in contempt for violating the order. We agree with both ARC and Attorney E.

Both parties to these investigative proceedings -- ARC and Attorney E -- must be able to use the documents in a limited way to prosecute and defend their respective cases even though there exists good cause to protect the pertinent

privacy interests.19

Otherwise, subpoenaed information about the FBI's investigation, clearly relevant to the inquiry into Attorney E's accusations, has no purpose. Consequently, ARC'S investigation of Attorney E is unduly hampered because even if it can subpoena certain information, it cannot use it. C.R.C.P. 251.10(b)(2). Attorney E, on the other hand, cannot effectively defend his case and participate fully in the investigation, as is his responsibility under the rules. C.R.C.P. 251.5(d). Given the implications of a protective order that prevents both parties from making any use of relevant documents, we conclude that the PDJ must modify the protective order to allow the limited use of the FBI documents by both parties.20 However, considering the

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19 We note that in the absence of a protective order, our rules allow the accused attorney to disclose any documents he or she receives during the investigative proceedings. On the other hand, ARC may not publicly disclose such documents unless one of the circumstances listed in Rule 251.31(b) exists. See supra, note 13. ARC may disclose information, documents and correspondence which are not the subject of a protective order as necessary to investigate allegations against the accused attorney.

20 Arguably, the protective order can be read to permit broader use of the documents than either party argues. This interpretation is buttressed by the PDJ's oral comments at the conclusion of the hearing on the protective order:

[Attorney E's Counsel]: Your Honor, at least partly this would lie -- would be a question to Regulatory [sic] Counsel, but I take it, your order as you presently have it in mind would prevent Attorney E from talking to any of the individuals identified in the FBI reports to determine the truth or falsity of the allegations made.

[PDJ]: If the source of the identity of those individuals is solely from these documents, I don't think it would preclude [Attorney E] from talking with them, but it would preclude [Attorney E] from disclosing the information within the documents.

privacy interests of the two judges named in the documents and consistent with the PDJ's oral comments, the parties should not disclose the existence of the documents themselves or inform witnesses that the information comes from FBI documents. To the extent that either party finds it necessary and essential to their respective cases to disclose to witnesses that certain information comes from the confidential documents, they may apply to the PDJ for a modification of the protective order to permit such disclosure. Whether such disclosure is necessary depends upon specific facts presented to the PDJ. By allowing limited use of the documents as needed by the circumstances of this case, the protective order appropriately will balance the privacy interests of third parties named in the documents with the investigative purposes of our attorney regulation system.

VI. Conclusion

The rule is made absolute in part and discharged in part, and the case is remanded to the Presiding Disciplinary Judge with directions to modify the protective order consistent with this opinion.

CHIEF JUSTICE MULLARKEY and JUSTICE BENDER do not participate.

[Attorney E's Counsel]: Well, if the information within the document is that . . . you were involved in a cartheft ring, is that true of false? He can't do that . . .

[PDJ]: You can ask the question different ways. Your example, the question could be asked, Are you involved a car ring? That doesn't disclose any information from the document. But to say, Look, I have these FBI documents in which its alleged that you're in a car are you? That discloses information.

APPENDIX B

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Original Proceeding in Discipline Pursuant to C.A.R. 21 and C.R.C.P. 251(d) Case No. 01PDJ098 Honorable Roger L. Keithley Presiding Disciplinary Judge	Case No. 01PDJ098
In Re: IN THE MATTER OF THE REQUESTS FOR INVESTIGATION OF ATTORNEY E.	
ORDER OF COURT	

The Court, sua sponte, intends to modify its opinion before final publication. Attached to this order is the final opinion with the proposed modifications indicated. The parties may submit any comments concerning the proposed changes to the court on or before September 17, 2003.

BY THE COURT, EN BANC, SEPTEMBER 4, 2003

cc: Alfred T. McDonnell
Arnold & Porter

John S. Gleason, Attorney Regulation Counsel
James S. Sudler, Assistant Regulation Counsel

Ken Salazar, Attorney General
Friedrick C. Haines, Assistant Attorney General

[The draft final opinion attached to this Order is omitted.]

APPENDIX C

RULE 45. SUBPOENA

(a) For Attendance of Witnesses; Form; Issue. Subpoenas may be issued under Rule 45 only to compel attendance of witnesses, with or without documentary evidence, at a deposition, hearing or trial. Every subpoena shall state the name of the court, and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may: (1) Quash or modify the subpoena if it is unreasonable and oppressive; or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to such person the fees for one day's attendance and the mileage allowed by law. Service is also valid if the person named in the subpoena has signed a written admission or waiver of personal service. When the subpoena is issued on behalf of the state of Colorado, or an officer or agency thereof, fees and

mileage need not be tendered. Proof of service shall be made as in Rule 4(h). Unless otherwise ordered by the court for good cause shown, such subpoena shall be served no later than forty-eight hours before the time for appearance set out in said subpoena. The party issuing or causing the issuance of the subpoena pursuant to this rule, except in post-judgment proceedings, shall serve a copy of the subpoena (including a complete list of documents and things requested to be provided pursuant to the subpoena) upon all parties of record, including pro se parties, in the manner prescribed by C.R.C.P. 5(b). Service on the other parties shall be made promptly after the service of the subpoena upon the person named therein. Original subpoenas and returns of service of such subpoenas need not be filed with the court.

(d) Subpoena for Taking Depositions; Place of Examination.

(1) A deposition subpoena, upon notice to all parties to the action, may require the production of documentary evidence which is within the scope of discovery permitted by Rule 26. Any party, the person to whom a deposition subpoena is directed, or any other person claiming an interest in the documents affected, may move for a protective order under Rule 26, in addition to any other remedy available under Rule 45. The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than ten days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena is not entitled to inspect and

copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of this state may be required by subpoena to attend an examination upon deposition only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state may be required by subpoena to attend only within forty miles from the place of service or in the county wherein he resides or is employed or transacts his business in person or at such other convenient place as is fixed by an order of court.

(e) Subpoena for Deposition, Hearing or Trial. Subpoenas for attendance at a deposition, hearing or trial shall be issued either by the clerk of the court in which the case is docketed, or by one of counsel whose appearance has been entered in the particular case in which the subpoena is sought. A subpoena requiring the attendance of a witness at a deposition, hearing or trial may be served any place within the state.

(f) Subpoena in Aid of Execution or Proceedings Subsequent to Judgment. Every subpoena or subpoena to produce issued in accordance with post-judgment proceedings of C.R.C.P. 69 shall comply with the provisions for service, attendance, production of documentary evidence, and depositions required by this Rule 45. Written interrogatories pursuant to C.R.C.P. 69 shall be personally served on the judgment debtor in

accordance with the requirements of, and in the manner provided for service of a subpoena under this Rule 45.

RULE 251.10. INVESTIGATION OF ALLEGATIONS

(a) When Commenced. If, pursuant to C.R.C.P. 251.9, the Regulation Counsel makes a determination to proceed with an investigation, the Regulation Counsel shall give the attorney in question written notice that the attorney is under investigation and of the general nature of the allegations made against the attorney. The attorney in question shall file with the Regulation Counsel a written response to the allegations made against the attorney within twenty days after notice of the investigation is given.

Upon receipt of the attorney's response, or at the expiration of the twenty-day period if no response is received, the matter shall be assigned to an Investigator for investigation and report.

(b) Procedures for Investigation.

(1) The Investigator. A member of the committee, the Regulation Counsel, a member of the Regulation Counsel's staff, or an attorney enlisted pursuant to C.R.C.P. 251.2(b)(1) may act as Investigator. The Investigator shall expeditiously conduct an investigation of the allegations made against the attorney in question.

(2) Procurement of Evidence During Investigation. In the course of an investigation conducted pursuant to these Rules, the Investigator, acting pursuant to and in conformity with these Rules, shall have the power to

administer oaths and affirmations.

In connection with an investigation of allegations made against an attorney, the Chair of the committee or the Regulation Counsel may issue subpoenas to compel the attendance of witnesses, including the attorney in question, and the production of pertinent books, papers, documents, or other evidence in proceedings before the Investigator. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. Any challenge to the power to subpoena as exercised pursuant to this Rule shall be directed to the Presiding Disciplinary Judge.

Any person who fails or refuses to comply with a subpoena issued pursuant to this Rule may be cited for contempt of the Supreme Court.

Any person who intentionally obstructs the Regulation Counsel or the committee or any part thereof in the performance of their duties may be cited for contempt of the Supreme Court.

Any person having been duly sworn to testify who refuses to answer any proper question may be cited for contempt of the Supreme Court.

A contempt citation may be issued by the Supreme Court upon recommendation of the Presiding Disciplinary Judge. A copy of the recommendation, together with the findings of fact made by the Presiding Disciplinary Judge surrounding the contemptuous conduct, shall be filed with the Supreme Court. The Supreme Court shall then determine whether to impose contempt.

(3) Investigator's Report. When the Investigator is not a member of the Regulation Counsel's staff, the Investigator shall submit a written report of investigation and recommendation to the committee for a determination as provided in C.R.C.P. 251.12. If the Investigator is a member of the Regulation Counsel's staff, the matter shall be submitted as provided in C.R.C.P. 252.11.

(4) Conditional Admission. While the matter is under investigation, the attorney in question and the Regulation Counsel may tender an agreed upon conditional admission of misconduct as provided in C.R.C.P. 251.22 to the committee when the form of discipline is no greater than a private admonition. When the form of discipline is greater than a private admonition or, if a range of disciplinary measures is specified in the conditional admission, then the conditional admission shall be tendered to the Presiding Disciplinary Judge. When a conditional admission is tendered pursuant to this Rule, the person acting as Investigator may forego submitting a written report of investigation and recommendation to the committee as provided in subsection (3) of this Rule.

RULE 251.31. ACCESS TO INFORMATION CONCERNING PROCEEDINGS UNDER THESE RULES

(a) Availability of Information. Except as otherwise provided by these rules, all records, except the work product, deliberations and internal communications of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, the Hearing Boards, and the Supreme Court shall be available to the public after the committee determines that reasonable cause to believe grounds for

discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, unless the complainant or the respondent obtains a protective order.

Unless otherwise ordered by the Supreme Court or the Presiding Disciplinary Judge, nothing in these rules shall prohibit the complaining witness, the attorney, or any other witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.

(b) Confidentiality. Before the filing and service of a complaint as provided in C.R.C.P. 251.14, the proceedings are confidential within the Office of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court, except that the pendency, subject matter, and status of an investigation may be disclosed by the Regulation Counsel if:

(1) The respondent has waived confidentiality;

(2) The proceeding is based upon allegations that include either the conviction of a crime or discipline imposed by a foreign jurisdiction;

(3) The proceeding is based on allegations that have become generally known to the public; or,

(4) There is a need to notify another person or organization, including the fund for client protection, to protect the public, the administration of justice, or the legal profession.

(c) Public Proceedings. When the committee determines that reasonable cause to believe that grounds for discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, or when a petition for reinstatement or readmission is filed, the proceeding is public except for:

(1) The deliberations of the Presiding Disciplinary Judge, the Hearing Board, or the Supreme Court; and,

(2) Information with respect to which a protective order has been issued.

(d) Proceedings Alleging Disability. In disability proceedings, all orders transferring an attorney to or from disability inactive status shall be matters of public record, but otherwise, disability proceedings shall be confidential and shall not be made public, except by order of the Supreme Court, the Presiding Disciplinary Judge, or a Hearing Board.

(e) Protective Orders. To protect the interests of a complainant, witness, third party, or respondent, the Presiding Disciplinary Judge or a Hearing Board, may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application.

(f) Disclosure to Law Firms. When the Regulation

Counsel obtains an order transferring the attorney to disability inactive status or immediately suspending the attorney, or is authorized to file a complaint as provided by C.R.C.P. 251.12, the attorney shall make written disclosure to the attorney's current firm and, if different, to the attorney's law firm at the time of the act or omission giving rise to the matter, of the fact that the order has been obtained or that a disciplinary proceeding as provided for in these rules has been commenced. The disclosures shall be made within fifteen days of the date of the order or of the date the Regulation Counsel notified the attorney that a disciplinary proceeding has been commenced.

(g) Pending Investigations. Except as provided by section (b) of this rule or when the attorney waives confidentiality, the Regulation Counsel shall treat as confidential proceedings pending with the Regulation Counsel or before the committee.

(h) Cases Dismissed. Except as provided by section (b) of this rule or when the attorney waives confidentiality, the Regulation Counsel shall treat as confidential proceedings that have been dismissed.

(i) Private Admonitions. Any public proceeding in which a private admonition is imposed as provided by C.R.C.P. 251.6 shall be public, as follows: the fact that private admonition is imposed shall be public information, but the private admonition itself shall not be disclosed.

(j) Production of Records Pursuant to Subpoena. The Regulation Counsel, pursuant to a valid subpoena, shall not permit access to files or records or furnish documents that are confidential as provided by these rules

unless the Supreme Court orders otherwise. When counsel is permitted to disclose confidential documents contained in files or confidential records, a reasonable fee may be charged for identification of and photocopying the documents and records.

(k) Response to False or Misleading Statement. If public statements that are false or misleading are made about any disciplinary or disability case, the Regulation Counsel may disclose any information necessary to correct the false or misleading statements.

(l) Request for Nonpublic Information. A request for nonpublic information other than that authorized for disclosure under subsection (b) of this Rule shall be denied unless the request is from:

(1) An agency authorized to investigate the qualifications of persons for admission to practice law;

(2) An agency authorized to investigate the qualifications of persons for government employment;

(3) An attorney discipline enforcement agency;

(4) A criminal justice agency; or,

(5) An agency authorized to investigate the qualifications of judicial candidates. If a judicial nominating commission of the State of Colorado requests the information it shall be furnished promptly and the Regulation Counsel shall give written notice to the attorney that specified confidential information has been so disclosed.

(m) Notice to the Attorney. Except as provided in subsection (l)(5) of this Rule, if the Regulation Counsel is permitted to provide nonpublic information requested, and if the attorney has not signed a waiver permitting the requesting agency to obtain nonpublic information, the attorney shall be notified in writing at his or her last known address of that information which has been requested and by whom, together with a copy of the information proposed to be released to the requesting agency. The notice shall advise the attorney that the information shall be released at the end of twenty days following mailing of the notice unless the attorney objects to the disclosure. If the attorney timely objects to the disclosure, the information shall remain confidential unless the requesting agency obtains an order from the Supreme Court requiring its release.

(n) Release Without Notice. If an agency otherwise authorized by section (l) of this rule has not obtained a waiver from the attorney to obtain nonpublic information, and requests that the information be released without giving notice to the attorney, the requesting agency shall certify that:

(1) The request is made in furtherance of an ongoing investigation into misconduct by the attorney;

(2) The information is essential to that investigation; and

(3) Disclosure of the existence of the investigation to the attorney would seriously prejudice that investigation.

(o) Notice to National Regulatory Data Bank. The Regulation Counsel shall transmit notice of all public discipline imposed against an attorney, transfers to or from disability inactive status, and reinstatements to the National Regulatory Data Bank maintained by the American Bar Association.

(p) Duty of Officials and Employees. All officials and employees within the Office of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court shall conduct themselves so as to maintain the confidentiality mandated by this rule.

(q) Evidence of Crime. Nothing in these rules except for the admission of past misconduct protected by C.R.C.P. 251.13(i) shall be construed to preclude any person from giving information or testimony to authorities authorized to investigate criminal activity.